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In The

Supreme Court of the United States

October Term, 1977

No. 77-783

A. B. MORRISON,

Petitioner

v.

AMOS E. REED, Secretary,
Department of Corrections
Raleigh, North Carolina,

Respondent

BRIEF OF THE RESPONDENT AMOS E. REED, Secretary, Department of Corrections North Carolina IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is DAVID L. JONES, Commissioner of Correction, Department of Social Rehabilitation and Control for North Carolina v. A. B. MORRISON, 565 F2d 272 (4th Cir. 1977) which reverses the order of Honorable James B. McMillan, 428 F. Supp 82 (W.D.N.C. 1977).

JURISDICTION

The jurisdiction of the Court has been invoked pursuant to 28 USC Section 1254 (1).

QUESTION PRESENTED

SHOULD A WRIT OF CERTIORARI ISSUE TO REVIEW A. B. MORRISON'S CONTENTION THAT HE WAS DENIED HIS RIGHT TO A SPEEDY TRIAL WHEN:

(a) HE HAS FAILED TO SURRENDER TO PRISON AUTHORITIES AS REQUIRED AFTER THE DENIAL OF HIS MOTION FOR STAY OF MANDATE BY CHIEF JUSTICE WARREN BURGER;

(b) NONE OF THE CONSIDERATIONS SET OUT IN RULE 19(b) OF THE SUPREME COURT RULES GOVERNING CERTIORARI ARE PRESENT IN THIS CONTROVERSY; and

(c) THE FOURTH CIRCUIT COURT OF APPEALS CORRECTLY HELD MORRISON WAS NOT DENIED A SPEEDY TRIAL WHERE THERE WAS NO BAD FAITH BY THE STATE SHOWN; WHERE MORRISON WAS NOT PREJUDICED BY THE DELAY, AND WHERE MORRISON NOT ONLY NEVER ATTEMPTED TO ASSERT HIS RIGHT TO A SPEEDY TRIAL, BUT INTENTIONALLY REFRAINED FROM SO DOING AS A MATTER OF TACTICS?

STATEMENT OF THE CASE

A. B. Morrison, along with George E. Cox, was arrested in Kentucky in September, 1969, on a fugitive warrant from Mecklenburg County, North Carolina, charging them with the September 4, 1969, killing of Ralph Gordon. They were subsequently indicted on January 5, 1970, and A. B. Morrison was tried on February 19, 1970, in Mecklenburg County

Superior Court on the charge of murder. George Cox was the principal witness for the state. This trial ended in a mistrial and A. B. Morrison was released on a $7,500.00 bond pending retrial. There was no immediate attempt to retry A. B. Morrison. In January 1971, the attorney for the State who subsequently retried the case, Peter Gilchrist, was transferred to the Superior Court section of the Solicitor's office and became aware of the pending case against A. B. Morrison. He reviewed the file along with the Solicitor at the time, Thomas F. Moore, and determined that in his opinion there was no evidence which had not been presented at the first trial to indicate that a successful prosecution could be obtained. Mr. Moore contacted the investigating officers in this regard, but Mr. Gilchrist did not personally speak with them.

On January 20, 1972, the State took a nol-pros with leave in the matter. During the time between the first trial and the nol-pros there was no attempt by Morrison or his lawyer to seek a speedy trial. In fact, Mr. Morrison's attorney stated in an affidavit dated August 27, 1975, that "Mr. Morrison and I discussed whether or not to make an affirmative request of the State to try the matter but decided not to do this as there was some indication from the State that it might take a nol-pros if there were no new evidence developed in the case."

After the State took a nol-pros, A. B. Morrison was released from bail and went to Tennessee where he worked first for Ernest T. Miller, and then for A. L. Tucker without incident.

In August, 1972, Lt. Smith, of the Charlotte City Police, one of the two investigative officers assigned to the Ralph L. Gordon homicide investigation, received a call from Mr. Linville Spencer in Kentucky who said he had a pistol which A. B. Morrison said he had used to kill a man in North Carolina. Mr. Spencer came down to Charlotte with the weapon and made a statement for the police. On the basis of this information, a new arrest warrant was issued for A. B. Morrison

and the case was recalendared.

On December 13, 1972, Judge William T. Grist set Morrison's bond at $1,000.00. The trial was set to begin on April 24, 1973. On April 20, 1973, the defendant attempted to secure a continuance, which was denied. No motion for a speedy trial or a request for dismissal of the action for failure to provide a speedy trial was made by the defendant at trial.

At the retrial, Mr. Gilchrist used essentially the same witnesses who were used in the first trial. The exceptions were Howard Bryan and L. G. Whitfield, who had both been known to the police at the time of the first trial, but who had been unable to testify due to illness. The State did not offer the testimony of Spencer at trial since it had been determined that the weapon possessed could not have been used in the crime and since there were indications of ill will between Spencer and A. B. Morrison. The decision not to have Spencer testify was made just prior to or during the trial.

A. B. Morrison was convicted of second degree murder and sentenced to twenty years imprisonment. His conviction was affirmed on appeal. Then and only then, by way of habeas corpus, did A. B. Morrison question whether or not he had been denied a speedy trial.

REASONS A WRIT OF CERTIORARI SHOULD NOT ISSUE

a. Pending this appeal, A. B. Morrison requested a Stay of Mandate from the Fourth Circuit Court of Appeals. The Court denied this Motion filed November 10, 1977. He then sought a Stay of Mandate from Chief Justice Warren Burger, which was denied on December 1, 1977. Mandate issued on November 21, 1977. To date, however, A. B. Morrison has failed to surrender to prison authorities as required and remains at large, whereabouts unknown. (See Addendum, Add.-1.)

This Honorable Court, in *Estelle* v. *Dorrough*, 420 US 534, 95 S.Ct. 1173, 43 LEd2d 377 (1975), noted that:

"Disposition by dismissal of pending appeals of escaped prisoners is a longstanding and established principle of American law. . . . This Court itself has long followed the practice of declining to review the convictions of escaped criminal defendants. *Smith* v. *United States*, 94 US 97, 24 LEd 32 (1876); *Bonahan* v. *Nebraska*, 125 US 692, 31 LEd 854, 8 S.Ct. 1390 (1887); *Eisler* v. *United States*, 338 US 189, 93 LEd 1897, 69 S.Ct. 1453 (1949); id. at 883, 94 LEd 542, 70 S.Ct. 181; cf. *Allen* v. *Rose*, 419 US 1080, 42 LEd 2d 675, 95 S.Ct. 669 (December 16, 1974). Thus, in *Molinaro* v. *New Jersey*, 396 US 365, 24 LEd 2d 586, 90 S.Ct. 498 (1970), we dismissed the appeal of an escaped criminal defendant, stating that no persuasive reason exists to adjudicate the merits of such a case and that an escape 'disentitles the defendant to call upon the resources of the Court for a determination of his claims.' Id. at 366 . . ." 420 US at 537.

In the present matter before the Court, there is no persuasive reason to adjudicate the merits of petitioner's case. He, like an escapee, should be disentitled to call upon the resources of the Court for a determination of his claims. Although he did not physically escape from prison, he has refused to submit himself to the lawful orders of the Court and is a fugitive from justice even as one who escaped from incarceration is. Therefore, this petition for Writ of Certiorari should be denied.

b. Rule 19 of the Supreme Court Rules indicates that Petitions for Writ of Certiorari should be granted only where there are special and important reasons to grant that Petition. Rule 19 (b) lists the type of reasons to be examined. The case which A. B. Morrison now requests this Court to grant Certiorari to review reveals that none of the considerations listed are present.

The issue which Morrison seeks to have reviewed is that of whether or not he was denied a speedy trial. First, the

Supreme Court has already spoken decisively on this issue in the case of *Barker* v. *Wingo*, 407 US 415, 92 S.Ct. 2182, 33 LEd 2d 101 (1972). Therefore, this is clearly a matter where there are no principles, the settlement of which are important to the public as opposed to the parties involved. In fact, because the law in this area is settled, the Supreme Court at most is being asked to review the evidence of this case and the inferences drawn from the evidence by the Court of Appeals. That reason is clearly not sufficient to warrant the granting of A. B. Morrison's Petition for Writ of Certiorari. *General Talking Pictures Corporation* v. *Western Electric Company*, 304 US 175, 58 S.Ct. 849, 82 LEd 1273 (1938).

Second, the decision rendered by the Fourth Circuit in this present matter in no way conflicts with *Barker* v. *Wingo*, *supra*, or, contrary to A. B. Morrison's assertions, *Klopfer* v. *North Carolina*, 386 US 213, 87 S.Ct. 988, 18 LEd 2d 1 (1967). The decision of the Fourth Circuit in this matter likewise does not conflict with any decisions found in any of the other circuits.

A. B. Morrison draws particular attention to the use of the *nolle prosqui* with leave used in this case. However, this procedural rule is no longer in use in North Carolina. Likewise, the General Assembly of North Carolina has recently passed a comprehensive Speedy Trial Act which sets absolute limits at which point trial must take place. See N. C. General Statutes 15A-701 through 15A-704 (1977 Cumulative Supplement). Therefore, A. B. Morrison's conviction is of even less importance to jurisprudence because the General Assembly has changed the criminal procedure both as to the *nolle prosequi* with leave and speedy trials since his conviction.

It is clear, therefore, that petitioner presents no reason for the Supreme Court to grant a Petition for Writ of Certiorari in this matter.

c. The Fourth Circuit Court of Appeals, in its decision reversing the ruling of the United States District Court in this matter, correctly applied the principles of *Barker* v. *Wingo*,

supra, to the factual situation of this case. The Fourth Circuit stated, "While we agree with the district court that the delay of some three years was sufficient to trigger a consideration of the other factors identified in *Barker*, in our opinion the absence of any showing of prejudice and the failure of the petitioner to assert his right to a speedy trial preclude relief in this case." A-4

The Sixth Amendment to the United States Constitution mandates in part that in all criminal prosecutions, the accused shall enjoy a right to a speedy trial. However, the right cannot be quantified in terms of any fixed period of time, like a statute of limitations since the mere passage of time will not per se establish an unconstitutional denial of a right to a speedy trial. *Barker* v. *Wingo*, *supra*; *Ricon* v. *Garrison*, 517 F2d 628 (4th Cir.) cert denied 423 US 895, 96 S.Ct. 195, 46 LEd 2d 127 (1975).

Instead a determination of whether or not there has been a speedy trial must be made on the basis of balancing four factors: length of delay, the reason for the delay, prejudice to the defendant, and action by the defendant. *Barker* v. *Wingo*, *supra*. The necessity of having a practical case by case balancing of these rather flexible standards is mandated by the severe remedy—dismissal of the charges or conviction—to be applied when denial of a speedy trial is found to have occurred. *Struck* v. *United States*, 412 US 434, 93 S.Ct. 2260, 37 LEd 2d 56 (1973).

The length of delay in the present matter, thirty-eight months, while certainly long enough to trigger inquiry into the other factors suggested by *Barker* v. *Wingo*, *supra*, is not so long a period of time to require a finding that there had been a speedy trial violation. *Ricon* v. *Garrison*, *supra* (36 month delay); *United States* v. *Perez*, 489 F2d 51 (5th Cir.) cert denied 417 US 945, 94 S.Ct. 3067, 41 LEd 2d 664 (1974) (36 month delay); *United States* v. *Drummond*, 488 F2d 972 (5th Cir. 1974) (39 month delay); *United States* v. *Rosenstein*, 474 F2d 705 (2nd Cir. 1973). The length of delay in

the present matter is not even as great as the length of time—over five years between arrest and trial—found not to constitute a denial of a speedy trial in *Barker* v. *Wingo, supra.*

The second factor considered under the *Barker* test, reason for delay, reveals that the delay was due to an assistant district attorney's initial evaluation of his probable success at retrial not being high. Later he reopened the case in good faith, on the basis of new evidence which later proved illusory. He then decided that the evidence previously available did justify a retrial attempt. Thus, the record reveals no intentional delay by the State to gain unfair advantage and no other bad faith on the State's part. Therefore, the delay in this case is more neutral a factor than intentional delay tactics by the State, and should not be heavily weighed against the State. *Barker* v. *Wingo, supra; United States* v. *Toy,* 482 F2d 741 (D.C. Cir. 1973); *Ricon* v. *Garrison, supra.*

The third factor to be considered is whether or not the defendant is prejudiced by the delay. Obviously, an affirmative demonstration of prejudice to the defendant is not necessary to prove a denial of his constitutional right to a speedy trial, *Moore* v. *Arizona,* 414 US 25, 94 S.Ct. 188, 38 LEd 2d 183 (1973). Nevertheless, prejudice is a factor which must be considered along with all the other relevant circumstances. *Barker* v. *Wingo, supra.* Indeed, of the four factors to be assessed, prejudice to the defendant is the most critical one. *Trigg* v. *Tennessee,* 507 F2d 949 (6th Cir. 1974) cert denied 420 US 938, 95 S.Ct. 1148, 43 LEd 2d 414 reh. denied 420 US 998, 95 S.Ct. 1439, 43 LEd 2d 680 (1975); *United States* v. *Reynolds,* 489 F2d 4 (6th Cir. 1973). Prejudice should be assessed in the light of the interests of a defendant that the Sixth Amendment was designed to protect: prevention of oppressive pretrial incarceration, minimizing of the anxiety and concern of the accused, and limiting the possibility that the defense will be impaired. *Barker* v. *Wingo, supra.* A. B. Morrison in this matter not only failed to demonstrate any actual prejudice in this case, but also failed to establish any credible possibility of

prejudice.

A. B. Morrison was free from incarceration from February, 1970, until April, 1973. He was not even under any bond for a good portion of this time. His movements were obviously not hampered since he moved to Tennessee after his first trial. The record in the retrial shows he had no difficulty in holding a job and was highly regarded by his associates during the period of time between the first and second trial. There is certainly no showing of personal prejudice to Morrison in terms of the factors set out in *United States* v. *Marion,* 404 US 307, 320, 92 S.Ct. 455, 30 LEd 2d 468 (1971). Likewise, there is no showing of any damage to Morrison's defense. Morrison asserts there was prejudice since the prosecution witness Whitfield allegedly could have been more effectively cross-examined had Whitfield's memory of the circumstances been more fresh. However, a review of Whitfield's testimony on both direct and cross-examination reveals that if any side were hurt by Whitfield's delayed testimony, it was the State because Whitfield could only say Morrison resembled the man he had seen. Whitfield's testimony is a good example, in fact, of the comment made in *Barker* v. *Wingo, supra,* at page 521: "As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carrys the burden of proof." Morrison asserts, for the first time in his Certiorari Petition, that he was denied an important witness due to the delay. However, a review of the testimony makes it highly unlikely that the deceased cousin of Mr. Bryan would have been a defense witness. As noted by the Fourth Circuit, the District Court entered an Order expressly inviting Morrison to discuss all of the facts bearing upon his constitutional claim in light of *Barker.* Morrison failed to allege that any witness had died or become unavailable or that any impediment to his defense had occurred. Thus, his assertion of prejudice at this point should be regarded with some skep-

ticism. It is clear as the Fourth Circuit so found, that Morrison was not prejudiced by the delay in retrial.

The last factor which must be considered, according to *Barker* v. *Wingo, supra,* is whether or not the defendant asserted his right to a speedy trial. As stated in *Barker* v. *Wingo* at pages 531-532:

> "Whether or how a defendant asserts his right is closely related to the other factors. . . . The strength of his efforts will be affected by the length of the delay, to some extent by the reason for delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove he was denied a speedy trial."

In the present matter, the affidavit of Morrison's trial attorney shows that far from requesting retrial, as a matter of defense tactics discussed between Morrison and his attorney, Morrison decided not to attempt to request a retrial in hopes that the State would drop the case. This constitutes a strategic decision on his part which should bar relief to him. Additionally it also suggests any hardships suffered by Morrison were minimal. *United States* v. *Fairchild,* 526 F2d 185 (7th Cir. 1975), cert denied 425 US 942, 96 S.Ct. 1682, 48 LEd2d 186 (1976).

The foregoing review of the relevant factors described in *Barker* v. *Wingo* clearly shows that the Fourth Circuit correctly applied the Court's ruling in *Barker* v. *Wingo* and other relevant cases to this present matter. Morrison urges that the Fourth Circuit failed to apply the teachings of *Klopfer* v. *North Carolina, supra,* to this matter. Morrison's argument in this regard is simply lacking in merit. In *Klopfer* the Supreme

Court found that the Sixth Amendment right to a speedy trial was applicable to the states. The Supreme Court also found that the way in which the *nolle prosequi* with leave was being used in this case denied the defendant his right to a speedy trial where the defendant demanded that the charges against him be resolved. The procedure of *nolle prosequi* with leave, while criticized as unusual, was not declared to be unconstitutional, but rather its application to Dr. Klopfer was properly found violative of Dr. Klopfer's Sixth Amendment rights. In the present case, unlike *Klopfer,* Morrison not only did not request a speedy trial, but did not desire one. Thus, the decision in *Klopfer* is not in conflict with the Fourth Circuit's ruling in this matter.

Because the Fourth Circuit correctly followed the test set out in *Barker* v. *Wingo, supra,* the Petition for Writ of Certiorari filed in this matter should be denied.

CONCLUSION

Petitioner has shown no basis why a Writ of Certiorari should issue. The case was correctly decided by the Court of Appeals and the case is not in conflict with any decision of the Supreme Court or the other circuits. Accordingly, A. B. Morrison's application for Writ of Certiorari should be denied.

Submitted as the Brief in Opposition to the Petition for Writ of Certiorari, this the 10th day of February, 1978.

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ADDENDUM

NORTH CAROLINA
WAKE COUNTY

AFFIDAVIT

BEN L. BAKER, being duly sworn, deposes and says:

That he is Director of Combined Records for the North Carolina Department of Correction.

That on December 9, 1977, I was notified by the Honorable Richard League, Assistant Attorney General, that as a result of the Fourth Circuit Court's decision, subject A. B. Morrison was to surrender to the prison officials at the Mecklenburg County Prison Unit, Huntersville, North Carolina, no later than mid-night, December 14, 1977.

That as of this date, subject A. B. Morrison has not surrendered to the prison officials as previously arranged.

This the 25th day of January, 1978.

.....

Ben L. Baker

Sworn to and subscribed before me
on January 25, 1978

Evelyn J. McKenzie
Notary Public

My Commission expires: December 9, 1980